Supreme Court, U.S.
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No. 02-1267

In the

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC., a Delaware corporation; CHARTER COMMUNICATIONS PROPERTIES, LLC, a Colorado limited liability corporation; and PAUL G. ALLEN, an individual,

Petitioners,

v.

SANTA CRUZ COUNTY, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THE RULING DOES NOT CONFLICT WITH NATIONAL POLICY UNDER THE CABLE ACT 7

II. THERE IS NO CONFUSION AS TO THE APPLICATION OF DEFERENCE IN THE CABLE CONTEXT 14

III. THE NINTH CIRCUIT HAS NOT CREATED A RULE THAT BY CONTRACTING WITH GOVERNMENT, A SPEAKER WAIVES ALL FIRST AMENDMENT RIGHTS 15

IV. IN DENYING ITS CONSENT TO THE TRANSFER, THE COUNTY ACTED LEGISLATIVELY 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

ANAHEIM REDEVELOPMENT AGENCY V. DUSEK, 193 CAL.APP.3D 249, 239 CAL.RPTR. 319 (1987) 21

ARNEL DEVELOPMENT CO. V. CITY OF COSTA MESA, 28 CAL.3D 511, 169 CAL.RPTR. 904 (1980) 21

AT&T CORP. V. CITY OF PORTLAND, 216 F3D 871 (9TH CIR. 2000) 14

BOARD OF COUNTY COMM'RS V. UMBEHR, 518 U.S. 668 (1996) 16

BRYAN V. CITY OF MADISON, 213 F.3D 267 (5TH CIR. 2000), CERT. DENIED, 531 U.S. 1145 (2001) 24

CABLE ALABAMA CORP. V. CITY OF HUNTSVILLE, 768 F. SUPP. 1484 (N.D. ALA. 1991) 14

CALIFORNIA ASSN. OF PROFESSIONAL EMPLOYEES V. COUNTY OF LOS ANGELES, 74 CAL.APP.3D 38, 141 CAL.RPTR. 290 (1977) 22

CALIFORNIA V. CENTRAL PAC. R. CO., 127 U.S. 1 (1888) 19

CAPITAL CITIES CABLE V. CRISP, 467 U.S. 691 (1984) 11

CHICAGO CABLE COMMUNICATIONS V. CHICAGO CABLE COMM'N, 879 F.2D 1540 (7TH CIR. 1989) 18

CINEVISION CORP. V. BURBANK, 745 F.2D 560 (9TH CIR. 1984) 24, 25

CITY OF AUBURN V. QWEST CORP., 260 F.3D 1160 (9TH CIR. 2001) 12

CITY OF BERKELEY V. SUPERIOR COURT, 26 CAL.3D 515, 162 CAL.RPTR. 327 (1980) 24

CITY OF LAFAYETTE V. AMERICAN TELEVISION & COMMUNICATION CORP., 98 CAL.APP.3D 27, 159 CAL.RPTR. 271 (1979) 20

CITY OF LOS ANGELES V. ALAMEDA BOOKS, 122 S.CT. 1728 (2002) 16

CITY OF NEW YORK V. FCC, 486 U.S. 57 (1988) 12

CITY OF OTTAWA V. SAMMONS COMMUNICATIONS, INC., 836 F.SUPP. 555 (N.D. ILL. 1993) 12, 13

COMMUNICATIONS SYSTEMS, INC. V. CITY OF DANVILLE, 880 F.2D 887 (6TH CIR. 1989) 14, 15, 20

COX CABLE SAN DIEGO, INC. V. CITY OF SAN DIEGO, 188 CAL.APP.3D 952, 233 CAL.RPTR. 735 (1987) 23

CUTTING V. MUZZEY, 724 F.2D 259 (1ST CIR. 1984) 24

GOLDEN STATE TRANSIT CORPORATION V. CITY OF LOS ANGELES, 754 F.2D 830 (9TH CIR. 1985) REV'D ON OTHER GRNDS., 475 U.S. 608 (1986) 19

JOINT COUNCIL OF INTERNS & RESIDENTS V. BOARD OF SUPERVISORS, 210 CAL.APP.3D 1202, 258 CAL.RPTR. 762 (1989) 23

JONES INTERCABLE, INC. V. CITY OF STEVENS POINT, 729 F.SUPP. 642 (W.D. WIS. 1990) 13

KAMPLAIN V. CURRY COUNTY BD. OF COM'RS, 159 F.3D 1248 (10TH CIR. 1998) 24

LYNCH V. SAN FRANCISCO, 3 CAL.2D 141 (1935) 22

MEDIAONE GROUP, INC. V. COUNTY OF HENRICO, 257 F.3D 356 (4TH CIR. 2001)..... 14

MEDTRONIC, INC. V. LOHR, 518 U.S. 470 (1996)..... 14

MIKE MOORE'S 24-HOUR TOWING V. CITY OF SAN DIEGO, 45 CAL.APP.4TH 1294, 53 CAL.RPTR.2D 355 (1996)..... 23

MONARCH CABLEVISION, INC. V. CITY COUNCIL, 239 CAL.APP.2D 206, 48 CAL.RPTR. 550 (1966)..... 20

OAKLAND R. CO. V. OAKLAND, B., & F.V.R. .CO., 45 CAL. 365 (1873) 20

ONE WORLD ONE FAMILY NOW V. HONOLULU, 76 F.3D 1009 (9TH CIR. 1996) 16

ORANGE COUNTY CABLE COMMUNICATIONS CO. V. CITY OF SAN CLEMENTE, SUPRA, 59 CAL.APP.3D 165 (1976).....20, 21

OWEN V. CITY OF INDEPENDENCE, 445 U.S. 622 (1980)..... 17

PACIFIC ROCK & GRAVEL CO. V. UPLAND, 67 CAL.2D 666, 63 CAL.RPTR. 572 (1967) 19

PARAGOULD CABLEVISION, INC. V. CITY OF PARAGOULD, ARK., 930 F.2D 1310 (8TH CIR. 1991)..... 17

SANTA ANA TUSTIN COMMUNITY HOSPITAL V. BOARD OF SUPERVISORS, 127 CAL.APP.3D 644, 652, 653, 179 CAL.RPTR. 621 (1982).....23, 24

SANTA MARGARITA AREA RESIDENTS TOGETHER v. SAN LUIS OBISPO COUNTY BD. OF SUPERVISORS, 84 CAL.APP.4TH 221, 100 CAL.RPTR.2D 740 (2000).....22

SCOTT v. GREENVILLE COUNTY, 716 F.2D 1409 (4TH CIR. 1983).....24

SOUTHERN CALIFORNIA GAS CO. v. LOS ANGELES, 50 CAL.2D AT 713, 329 P.2D 289 (1958).....22

SOUTHERN PACIFIC PIPE LINES, INC. v. CITY OF LONG BEACH, 204 CAL.APP.3D 660, 251 CAL.RPTR. 411 (1988).....19

TIME WARNER v. FCC, 56 F.3D 151 (D.C. CIR. 1995).....12

TIME-WARNER CABLE v. BLOOMBERG L.P., 118 F.3D 917 (2ND CIR. 1997).....12

TRIBUNE-UNITED CABLE OF MONTGOMERY COUNTY v. MONTGOMERY COUNTY, 784 F.2D 1227 (4TH CIR. 1986).....12

TURNER BROADCASTING SYSTEM, INC. v. F.C.C., 512 U.S. 622 (1994).....16

UNION CATV, INC. v. CITY OF STURGIS, 107 F.3D 434 (6TH CIR. 1997).....10, 14, 15

UNITED STATES v. ALBERTINI, 472 U.S. 675 (1985).....16

UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968).....15

WARD v. ROCK AGAINST RACISM, 491 U.S. 781 (1989).....16

WILSON v. HIDDEN VALLEY MUN. WATER DIST., 256 CAL.APP.2D 271, 63 CAL.RPTR. 889 (1967).....23

WOJCIK V. CITY OF ROMULUS, 257 F.3D 600 (6TH CIR. 2001) 24

STATUTES

47 U.S.C. § 521 7

47 U.S.C. § 537 9

47 U.S.C. § 541(A)(4)(C) 9

47 U.S.C. § 546 15

47 U.S.C. § 546(C) 9

47 U.S.C. § 554 8

47 U.S.C. § 556 8

CAL. GOVERNMENT CODE § 53066(B) 20

OTHER AUTHORITIES

HOUSE REP. NO. 98-934 AT 19, 23, *REPRINTED IN* 1984 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS ("U.S.C.C.A.N.") AT 4656 ..... 7, 8

HOUSE REP. NO. 102-628 AT 120-121 (1992) 9

IN RE MATTER OF IMPLEMENTATION OF SECTIONS 11 AND 13 OF THE CABLE TELEVISION CONSUMER PROTECTION & COMPETITION ACT OF 1992, FCC REPORT & ORDER AT ¶ 36, FCC 93-332, MM DOCKET NO. 92-264 (1993) 8, 10

INTRODUCTION

Respondent County of Santa Cruz respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 304 F.3d 927 (2002). (App. at 1a-13a.)[1] The Ninth Circuit's opinion merely affirms well established principles under the separation of powers doctrine requiring judicial deference in the review of legislative acts. Contrary to Petitioners' assertions, affording deference neither conflicts with any national policy established by the Cable Act nor creates confusion in lower courts regarding the standard for reviewing local government acts in the cable television context.

Further, no significant free speech issues are raised by the opinion, which affirms that the deferential standard applies even when First Amendment rights are implicated. The Ninth Circuit's comments, in dicta, concerning waivers merely confirm that with regard to franchise transfers, franchisees are subject to the standard of review for which they freely contracted in their franchise agreements.

The application of these well established principles of judicial review is even more compelling here, for unlike the cases cited by Petitioners, this case does not concern an attempt by the County to condition the transfer of the subject franchise on improper concessions. Rather, it involves mere *requests for information* the County believed necessary to evaluate an application for government privileges, and the consequent denial of that privilege when the information

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[1] Citations in the form of "App. __" are to page numbers in the appendix to Petitioners' petition.

requests were refused and Petitioners otherwise failed to establish their financial and technical qualifications.

STATEMENT OF THE CASE

1. The Sonic-Charter Transaction

Petitioner Charter Communications Properties, LLC ("Charter"), a subsidiary of Petitioner Charter Communications, Inc. ("CCI"), holds a cable franchise for the southern unincorporated areas of the County ("Franchise"). Charter originally took over the Franchise from Sonic Cable Communications, Inc. ("Sonic") on May 19, 1998, after negotiations with, and approval by, the County.[2] Under the Franchise documents, Charter agreed to make extensive capital improvements, including a rebuild of the entire cable system. Charter's acquisition price for Sonic's systems was *$1,564 per subscriber*. (App. at 24a.) During negotiations, Charter specifically advised the County that the Franchise would be *only marginally profitable at that purchase price*. (Ct. App. ER at 664, 743-744.)[3]

2. The Charter-Allen Transaction

Only two months later, Petitioner Paul Allen contracted with CCI to purchase the company at an overall price of *$3,600 per subscriber*, more than twice the amount Charter had paid Sonic, and the most expensive price paid for a franchise nationwide. (App.

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[2] All of the pertinent events described herein took place in 1998.

[3] Citations in the form of "Ct. App. ER __" are to page numbers of Appellant's Excerpts of Record submitted to the Ninth Circuit. Respondent will provide the Court with copies of the materials cited herein should the Court so request.

at 24a.) Mr. Allen did not pledge any of his personal assets to any of the Franchise's obligations or debt. (Ct. App. ER at 76-77, 356, 649-650.)

On August 18th, Petitioners requested the consent of the County and other franchising authorities to the proposed transfer by submitting copies of FCC Form 394 ("Form 394"), the Federal Communications Commission form required to initiate such transfers. In light of the just-closed Sonic-Charter transaction and Mr. Allen's recent purchase of another large cable system, Marcus Cable, Allen's proposed take-over of CCI raised several "red flags," including: the high acquisition price and its potential impact on rates and services (especially given Charter's representations that the Franchise was only marginally profitable at the much lower acquisition price); the stability of management (Marcus lost several top executives after Allen's take-over); and the operational impacts of the proposed roll-up into one company of CCI and Marcus.

Because the Cable Act required the County to act within 120 days of submission of the Form 394, *i.e.*, by December 16th, the County quickly sought information it thought pertinent to the transfer. A week after receiving the Form 394, County staff met with Petitioners and requested that they address the "red flag" issues by funding a due diligence financial report by a mutually acceptable independent consultant. (Ct. App. ER at 692-693, 696-697, 698-700.) Thus, contrary to Petitioners' assertion that the County *insisted* that Petitioners fund a report, the County merely *requested* that this be done. The County never ruled out any other methods by which Petitioners could address its concerns, and Petitioners never suggested an alternative

method of doing so.[4]

A week after the meeting, the County sent Petitioners an information request concerning the transfer. Petitioners provided some information in response, but put off formally committing to the financial report. After several weeks, the County became concerned that it would not receive the information necessary to evaluate the transfer. Thus, on November 2nd, it sent Petitioners a second information request, asking follow-up questions regarding responses to the first request, and seeking further explanation of management and financial issues. The County also suggested that Petitioners directly retain a consultant and submit their own financial report.[5] (Ct. App. ER at 705-706, 713-714, 318-334.)

Shortly before the December deadline for County action, Petitioners repudiated their earlier representations and for the first time advised the County that they would neither participate in a due diligence study nor respond to the second information request, claiming that franchising authorities could not legally

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[4] Although Petitioners initially quibbled with the need for a study and with who would prepare it, they led the County to believe they would perform one. (App. at 27a, 63a; Ct. App. ER at 211.) Ultimately, Petitioners decided not to participate in a study or to provide certain requested information, asserting that under the Cable Act the County was foreclosed from asking for any information outside of that provided in the Form 394. The district court categorically rejected this assertion (App. at 58a-59a), and Petitioners abandoned the issue on appeal. (*See, also*, Petition at 12, n. 5, where Petitioners concede that additional information beyond the Form 394 may be requested by local authorities.)

[5] Ironically, Mr. Allen had caused such a due diligence report to be prepared in *July 1998* by NationsBanc Montgomery Securities. Petitioners, however, did not offer it for the County's review. (Ct. App. ER at 518-641.)

ask for information in addition to that provided in the Form 394.[6] Instead, Petitioners offered *to negotiate "conditions of approval"* with the County *outside of the Form 394 process.* (App. at 40a; Ct. App. ER at 645, 714-717.) The County requested that Petitioners reconsider their position, but Petitioners refused to do so. (Ct. App. ER at 338-348.)

Faced with this recalcitrance and the looming deadline, the County Board of Supervisors ("Board") on December 8th, adopted Resolution No. 445-98, comprised of nine pages of findings and 88 pages of exhibits, denying consent to the transfer without prejudice. ***Contrary to Petitioners' repeated assertions that the County's denial was based on Petitioners' refusal to agree to a rate freeze or to pay a $500,000 mitigation fee to the County*** (Petition at 2, 4-5, 6), ***the Resolution contains no mention whatsoever of such matters.*** (Ct. App. ER at 349-447.) Rather, the Resolution contains 22 separate paragraphs identifying a host of issues that were insufficiently addressed by Petitioners, and expressly provides that the denial was based on Petitioners' failure (i) to respond to the second information request; (ii) to cooperate in the County's due diligence investigation; and (iii) to otherwise address the "red flag" issues or to affirmatively demonstrate their technical and financial qualifications to operate the cable system. (*Ibid.*)

After the Board's denial, Petitioners hired an attorney who had previously worked with the County to solicit conditions from the County for granting its consent. The attorney urged the County to negotiate, warning the County that (i) under no circumstances

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[6] See footnote 4, *supra.*

would Petitioners provide any more evaluative information or otherwise justify the viability of the transaction; (ii) Petitioners would close the transaction by the end of 1998 whether or not the County consented; and (iii) a failure to reach a mutually acceptable resolution of the matter would result in a "big fight." (App. at 40a.) Recognizing it would not receive the information it needed to properly evaluate the transfer, but wanting to avoid the threatened litigation, the Board determined to respond to Petitioners. It did so, however, only on terms that would mitigate the transfer's impacts on rates and services, *i.e.*, it would consent only if Petitioners agreed to temporarily freeze rates and to make a payment into an existing subscriber protection fund, which would be available to address any adverse impacts that might be suffered by subscribers. Petitioners rejected those terms.

Thus, contrary to Petitioners' characterization of events, the County's post-denial rate freeze and payment proposals were not *demands*, but were part of a negotiation *solicited by Petitioners* after they had refused to participate in the prescribed Form 394 process. Because these proposals were made well *after* the Board's denial of consent on December 8th, Petitioners' rejection of the proposals could not have formed any basis for the denial itself, and thus the proposals were legally irrelevant.[7]

When those settlement attempts failed, Petitioners violated the County's ordinance and the Franchise by closing their transaction without the Board's consent and, as promised, sued the County.

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[7] This post-denial "evidence" also should have been excluded under Federal Rule of Evidence 408 [settlement statements inadmissible].

REASONS FOR DENYING THE WRIT

I. THE RULING DOES NOT CONFLICT WITH NATIONAL POLICY UNDER THE CABLE ACT

The statutory provisions pertinent to the cable television issues involved here are found at 47 U.S.C. sections 521 *et seq.* (collectively, "the Act"). Petitioners assert that the Act and its implementing FCC regulations establish a national policy concerning cable communications which severely restricts the role of local government in the regulation of cable television transfers. Accordingly, it was error for the Ninth Circuit to afford any deference to the County's denial of the subject franchise transfer, as this undercut that national policy.

Petitioners' argument significantly overstates the scope and preemptive effect of the national policy established by the Act. Although a purpose of the Act was to "establish a national policy concerning cable communications" (47 U.S.C. § 521), that policy was intended to *clarify* the existing system of local, state, and Federal regulation of cable television, *not to preempt local regulation.* (H.R.Rep. No. 98-934 at 19, 23, *reprinted in* 1984 U.S. Code Congressional & Administrative News ("U.S.C.C.A.N.") at 4656, 4660 ("House Report").) The House Report specifically acknowledges that the Act recognizes "the *authority of local governments* to regulate cable television through the franchise process," and preserves "the *critical role of municipal governments in the franchise process,* while providing appropriate deregulation *in certain respects* to the provision of cable service." (*Id.* at 4656, emphasis added.)

The Act, itself, expressly provides that it does not affect the regulatory authority of state and local entities regarding matters of public welfare, and preempts only local provisions that are *inconsistent* with the Act. (47 U.S.C. §§ 556, 554.) Congress and the FCC have deemed it necessary to preempt only certain areas of cable regulation (*e.g.*, signal carriage, technical standards, rates) to promote the development of cable into a national communications structure. Other areas, including franchising and transfers, have been expressly left to local control. As the House Report plainly states:

> It is the Committee's intent that the franchise process take place *at the local level where city officials have the best understanding of local communications needs* and can require cable operators to tailor the cable system to meet those needs.

(House Report, 1984 U.S.C.C.A.N. at 4661, emphasis added.)

Similarly, the FCC has acknowledged that "local authorities are most familiar with individual cable operators and franchise agreements and are better positioned to evaluate the effects of a proposed transfer on cable rates and service." (*In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992*, FCC Report & Order at ¶ 36, FCC 93-332, MM Docket No. 92-264 (1993) ("1993 Report & Order").) As for the information franchising authorities may seek in connection with their franchising activities, the FCC has stated that in addition to the Form 394, which initiates a franchise transfer request, "[l]ocal authorities may request additional information reasonably necessary to

determine the qualifications of the proposed assignee or transferee." (*Id.* at ¶ 4.)

Petitioners cite to nothing in the Act or regulations that purports to preempt a franchising authority from exercising its discretion in connection with a request for consent to a franchise transfer. Nor do they cite to any substantive limitations or standards that govern the approval of transfers. The reason is clear: The Act places no substantive limitations on franchising authorities in connection with franchise transfers, requiring only, under section 537, that they act on a request within 120 days of its submission. (47 U.S.C. § 537.) Indeed, in awarding, renewing, or approving the transfer of a franchise, local franchising authorities are authorized under the Act to request such information that they deem necessary and to require adequate assurance that the proposed cable operator has the financial, technical, and legal qualifications to provide cable service. (47 U.S.C. §§ 537, 541(a)(4)(C), 546(c).) As plainly stated in the House Report regarding franchise transfers:

> [Section 537] is *not intended to limit, or give the FCC authority to limit, local authority to require* in franchises that cable operators provide *additional information* or guarantees with respect to a cable sale or transfer. [I]t also is *not intended to limit, or give the FCC authority to limit, a franchise authority's right to grant or deny a request for approval of a sale or transfer, in its discretion,* consistent with the franchise and applicable law.

(House Rep. No. 102-628 at 120-121 (1992), emphasis

added.)

The FCC has also specifically recognized that the Act involves only procedural limitations. Section 537 does *not* require the FCC to adopt "substantive standards governing the approval of transfers," in contrast to other statutory provisions that do preempt local authority, such as those regarding rate regulation and franchise fees. (1993 Report & Order at ¶ 39, n. 38.) The district court agreed. (App. at 58a-59a.)

Thus, contrary to Petitioners' assertions, part of the national policy of the Act and its implementing regulations is to *preserve the critical role of franchising authorities in the franchising process.* Affording judicial deference to their determinations as to what information is necessary to evaluate the qualifications of a proposed transferee *promotes*, rather than hinders, that national policy.

None of the cases cited in the Petition suggest otherwise. Indeed, the only reported case addressing this issue contradicts Petitioners' position. (*Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 441 (6th Cir. 1997) ["Nothing in the Cable Act suggests that Congress intended to eliminate judicial deference to a municipality's legislative acts."]) Rather than deal with standard of review issues, the cases cited by Petitioners all concern issues of preemption or statutory interpretation. Those issues are questions of law, which are reviewed *de novo;* consequently, the cases are irrelevant to the issue of whether it is appropriate to afford deference to the consent decisions of franchising authorities. Here, the issue is not whether the imposition of a particular condition was preempted or otherwise foreclosed by statute; rather, the issue is whether a franchising authority's determination to seek

additional information in connection with a transfer request, and to deny its consent when substantive issues go unaddressed, was entitled to deference.

In citing *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), Petitioners have smuggled a Trojan Horse into their own camp, for the case expressly contradicts their argument that the Act has so limited the discretionary role of franchising authorities that no deference is due their decisions. There, this Court held that the application of an alcohol advertising ban to out-of-state cable signals was *preempted*. Of particular significance to Petitioners' argument here, however, is the Court's discussion of the Act's national policy:

> In making the boundaries of its jurisdiction, the FCC . . . announced a program of "deliberately structured *dualism*" in which *state and local authorities were given responsibility for granting franchises to cable operators within their communities*. . . . At the same time, the Commission retained exclusive jurisdiction over all operational aspects of cable communications, including signal carriage and technical standards.

(*Id.* at 702, emphasis added.) Whereas the FCC has determined that national communication policy would be undermined were local governments permitted to regulate in piecemeal fashion the signals carried by cable operators, no such determination has been made regarding franchisee selection, whether by way of initial entry or purchase. As the Court noted, that area has not been preempted and remains the responsibility of franchising authorities. (*Id.* at 703, n. 8, 704.)

City of New York v. FCC, 486 U.S. 57 (1988), another preemption case, is equally unavailing. This Court held there that the FCC did not exceed its statutory authority in preempting state and local technical standards governing the quality of cable signals. (*Id.* at 59-60.) The FCC, however, has not preempted the transfer approval process. Indeed, as the opinion expressly states, "[t]he Cable Act left franchising to state and local authorities." (*Id.* at 61.)

Nor do the other cases cited in the Petition have relevance here. *Time Warner v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), holds that the Act preempted the regulation of certain rates and programming requirements. (*Id.* at 188, 198.) The instant action concerns neither of those subjects.[8] *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), another preemption case, concerns section 253 of the Federal Telecommunications Act of 1996, which has no application to cable television. *Time-Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2nd Cir. 1997), deals with statutory interpretation and the operational aspects of cable television, not franchising. *Tribune-United Cable of Montgomery County v. Montgomery County*, 784 F.2d 1227 (4th Cir. 1986), merely holds that under the Act, an operator's application for modification of franchise requirements automatically stays a franchising authority's ability to enforce penalty provisions under the franchise agreement. *City of Ottawa v. Sammons Communications, Inc.*, 836 F.Supp. 555 (N.D. Ill. 1993), a district court case, barred franchising authorities that had failed to comply with certain statutory prerequisites from challenging rates charged by a cable operator. (*Id.*

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[8] As stated, the County's post-denial rate freeze proposal was in response to Petitioners' attempts to negotiate a settlement of the transfer dispute. It was not a part of the Form 394 review process and was not a basis for the County's denial.

at 565.) Finally, *Jones Intercable, Inc. v. City of Stevens Point*, 729 F.Supp. 642 (W.D. Wis. 1990), another district court preemption case, simply holds that under the Act, franchising authorities were not authorized to require operators to carry specific cable services. (*Id.* at 650.)

As is plainly evident, none of these cases support Petitioners' assertions regarding the deferential review of consent decisions.[9]

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[9] Petitioners also refer to recent cable mega-mergers involving AT&T as reason to grant certiorari. They claim that such mergers require the consent of hundreds of franchising authorities, which, under the Ninth Circuit's ruling, will somehow be allowed to assert "pretextual concerns" in order to extort illegal concessions, thereby dramatically impacting the cable industry. (Petition at 28-29.) Of course, nothing in the Ninth Circuit's ruling allows local government to "extort" anything. Moreover, Petitioners' argument highlights, rather than negates, the need for local government review of proposed transfers, for the referenced mergers demonstrably exposed hundreds of franchising authorities and millions of cable subscribers to increased risks. After its merger with TCI, AT&T suffered a drastic decline in its stock prices, and it defaulted on many of its franchise obligations (*e.g.*, falling behind schedule in upgrading its cable networks) due to an admitted "capital crunch." ("AT&T Broadband: A Hard Sell," Lisa DiCarlo, *Forbes.com*, October 25, 2001.) Similarly, as chronicled in a recent *Wall Street Journal* article, Charter is now "overleveraged and underperforming," due in part to diminishing revenues from small and midsized cable systems. ("Paul Allen's in Danger of Losing His Charter," Peter Grant, *The Wall Street Journal*, January 29, 2003.) As recognized by the Ninth Circuit, such financial struggles could well impact the cost, quality, and range of cable services available to subscribers in the County. (App. at 9a.) Thus, the events to which Petitioners refer validate the County's concerns, not Petitioners'.

II. THERE IS NO CONFUSION AS TO THE APPLICATION OF DEFERENCE IN THE CABLE CONTEXT

Citing more preemption cases, namely *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001), *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991), and *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), Petitioners assert that because no special deference was afforded the franchising authorities in those cases, those cases conflict with cases like *Communications Systems, Inc. v. City of Danville*, 880 F.2d 887 (6th Cir. 1989) and *Union CATV, Inc. v. City of Sturgis, supra*, 107 F.3d 434, where deference was afforded. This argument misses the mark because it equates the standard of review in preemption cases with the standard of review of discretionary acts.

Preemption cases concern the primacy of Federal laws over competing or related state laws. The analysis in such cases begins with the text of the Federal statute to determine the scope of the preemption, and then determines whether the challenged action falls within that scope. (*See, Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).) If it does, the action is disallowed. For example, because the Cable Act preempts the regulation of (i) Internet access and (ii) the number of cable systems that can be owned, *MediaOne, Cable Alabama*, and *AT&T* held that conditioning approval of a transfer on the franchisee's granting open access to Internet service providers or denying a transfer where the transferee owned other local cable systems, violated the Act. The legitimacy of the franchising authorities' decisions in those cases depended on the *de novo* review of a statute, not on whether deference was afforded the decisions. Because deferential review was

not an issue in those cases, they do not conflict with cases that do accord deference.

On the other hand, the *City of Danville* and *Union CATV* cases concern the award or renewal of a franchise, discretionary actions that are *not* preempted under the Act. Because the courts there were reviewing discretionary actions, rather than statutory provisions, the franchising authorities' decisions were entitled to deference.[10] (880 F.2d at 891; 107 F.3d at 441.) Thus, there is no confusion in the lower courts as to when to accord deference to local government acting in the cable area.

III. THE NINTH CIRCUIT HAS NOT CREATED A RULE THAT BY CONTRACTING WITH GOVERNMENT, A SPEAKER WAIVES ALL FIRST AMENDMENT RIGHTS

Petitioners argue that the Ninth Circuit's ruling will "preclude any First Amendment challenge to the possibly unconstitutional acts of local governments against cable franchisees." (Petition at 17.) A balanced reading of the Ninth Circuit's analysis does not support such a drastic conclusion. In performing its First Amendment analysis, the Ninth Circuit *first* applied the test established by *United States v. O'Brien*, 391 U.S. 367 (1968), under which a content-neutral regulation withstands attack if it furthers an important or

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[10] Because of special policy considerations (*see*, House Report, 1984 U.S.C.C.A.N. at 4662), the Act prescribes the higher "preponderance of the evidence" standard of review for franchise *renewals*. (47 U.S.C. § 546 (e).) The more deferential "arbitrary/capricious" standard applies to the review of legislative actions such as franchise *grants* and *transfers*. (*See, Orange County Cable Communications Co. v. City of San Clemente*, 59 Cal.App.3d 165, 174, 130 Cal.Rptr. 429 (1976).)

substantial government interest that is unrelated to the suppression of free expression. (*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).) Specifically, the Ninth Circuit held:

> Finally, since the County's judgment was *reasonable*, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by *a legitimate governmental interest.*

(App. at 11a, emphasis added.) By effectively merging the assessment of "reasonableness," the franchise agreement's contractually agreed-to standard of review, with the "legitimate government interest" test under *O'Brien*, the Ninth Circuit heeded this Court's repeated directives that courts should not stray from a deferential standard of review of legislative actions, even when First Amendment rights are implicated.[11] (*City of Los Angeles v. Alameda Books*, 122 S.Ct. 1728, 1736 (2002), *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996); *One World One Family Now v. Honolulu*, 76 F.3d 1009, 1113 (9th Cir. 1996).)

Significantly, only *after* holding that the County's reasonable conduct passed *O'Brien's* legitimate government interest test did the Ninth Circuit note, in dicta, that Charter had waived any right to argue that a higher standard applied to the franchise transfer simply

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[11] *O'Brien* also requires that the "regulation promote[] a substantial government interest that would be achieved less effectively absent the regulation." (*Ward v. Rock Against Racism*, 491 U.S. 781, 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).) The County, however, had only two options on the transfer application, approve or deny, and the only option that would have advanced any of the interests acknowledged by the Ninth Circuit was denial.

because a First Amendment issue was potentially involved:

> Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise, and thus, *to that extent*, waived its right to claim that a denial of a transfer violated its First Amendment rights.

(App. at 11a-12a, footnote omitted, emphasis added.) Explaining further, the court stated that: (i) a waiver of constitutional rights can be implied from the terms and conditions of a contract where the party claiming the right is sophisticated and represented by counsel (*Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1314 (8th Cir. 1991)); and (ii) public policy militates in favor of enforcing the "reasonableness" standard set forth in the Franchise agreement because the County should "be careful in its role as steward." (App. at 12a, n. 9.) From this analysis flows the very same conclusion that flows from the Ninth Circuit's application of the *O'Brien* test: The "reasonableness" standard of the Franchise agreement guides the First Amendment analysis of the County's transfer denial.[12]

The Ninth Circuit's ruling does not, as Petitioners claim, provide such unbridled discretion so as to "grant the County the ability to act unlawfully or unconstitutionally." (Petition at 19, citing *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).) On the contrary, the ruling simply states that Charter waived its

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[12] Because they agreed to the "reasonableness" standard in the Franchise agreement, Petitioners are likewise barred from challenging that standard on vagueness grounds.

right to claim the transfer denial must be *more than reasonable* to pass Constitutional muster, a claim rejected by the court under its *O'Brien* analysis. (App. at 11a.)

Nor did the Ninth Circuit "create a rule that by entering into a contract with the government, a speaker waives *all* rights to challenge the government's actions on First Amendment grounds." (Petition at 20, emphasis added.) The court merely affirmed that sophisticated parties represented by counsel will be held to the terms and standards expressly set forth in their contracts regarding franchise transfers. Nothing in the ruling suggests that by agreeing to a standard of review for *franchise transfers*, Charter somehow waived its First Amendment rights relating to *programming content, channel lineup, or any of the other variety of speech-related activities that arise in the cable television context.*[13]

Finally, the claim that the Ninth Circuit's analysis somehow implies a waiver of Mr. Allen's First Amendment rights finds no support in the ruling. The court did not purport to extend the waiver analysis of footnote 9 to Mr. Allen because his rights were sufficiently addressed under the *O'Brien* analysis, where the court found that the transfer denial advanced the County's legitimate government interests. Mr.

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[13] Petitioners' suggestion that a local government's undue leverage makes franchise negotiations inappropriate for finding constitutional waiver is supported neither by the facts of this case nor Petitioners' cited authority, *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989). That case *did not decide* whether a First Amendment waiver could be construed from the franchise agreement because the issue of "unequal bargaining power" *had not been raised* by either of the parties. (*Id.* at 1548, n. 6.)

Allen's rights relating to the transfer evaluation process could not have been any greater than Charter's, as he was seeking to assume Charter's position under the Franchise agreement.

IV. IN DENYING ITS CONSENT TO THE TRANSFER, THE COUNTY ACTED LEGISLATIVELY

Finally, Petitioners assert that deference should not have been afforded the County's denial of consent because, rather than being legislative in nature, the denial was merely an administrative act under a contract. A franchise, however, is more than simply a contract; it is a special privilege conferred for the use of a sovereign body's property. It is reserved for public control by the government and is subject to such conditions and regulations as the government may impose in the public interest and for the public security. (*California v. Central Pac. R. Co.*, 127 U.S. 1, 40-41 (1888); *Southern Pacific Pipe Lines, Inc. v. City of Long Beach*, 204 Cal.App.3d 660, 666, 251 Cal.Rptr. 411 (1988).)

As found by the Ninth Circuit, franchise grants, renewals, and consents to rate increases are all legislative acts. Although Petitioners criticize that court for citing no supporting precedent (Petition at 23), the reason is self-evident: Petitioners *conceded* those points. (App. at 5a.) In any event, a myriad of cases so hold. (*Pacific Rock & Gravel Co. v. Upland*, 67 Cal.2d 666, 668, 63 Cal.Rptr. 572 (1967) [franchise *grant* is a legislative act]; *Golden State Transit Corporation v. City of Los Angeles*, 754 F.2d 830, 834 (9th Cir. 1985), *rev'd on other grnds.*, 475 U.S. 608 (1986) [franchise *renewal* is a legislative act]; *Orange County Cable Communications Co. v. City of San Clemente*, *supra*,

59 Cal.App.3d at 171 [denial of consent to *rate increase* is a legislative act]; *see, also, Oakland R. Co. v. Oakland, B., & F.V.R. .Co.*, 45 Cal. 365, 379 (1873) [whether a franchisee can *assign* a portion of its franchise is a matter which concerns the public alone].)

This is true for cable television franchises in particular. (*Monarch Cablevision, Inc. v. City Council*, 239 Cal.App.2d 206, 210, 48 Cal.Rptr. 550 (1966); *Communications Systems, Inc. v. City of Danville, supra*, 880 F.2d at 891, 892; Cal. Government Code § 53066(b) [county *may* award a cable franchise on any consideration that "will safeguard the local public interest"]; *City of Lafayette v. American Television & Communication Corp.*, 98 Cal.App.3d 27, 36, 159 Cal.Rptr. 271 (1979) ["It is wholly appropriate for the county, under the delegation represented by Government Code section 53066, to make its own *legislative* determination of what the public interest is and requires; a court's view of the public interest cannot in any event supplant that of the appropriate legislative body. . . ."].)

Petitioners offer no basis for treating franchise *transfer consents* differently. If anything, transfers are more clearly legislative than renewals. With *renewals*, a franchising authority has restricted discretion under the Act (47 U.S.C.§ 546) and it evaluates a *known* quantity, the incumbent franchisee. With *transfers*, a franchising authority's discretion is statutorily unrestricted and it evaluates a *new* entity operating under different financial and management circumstances.

Here, it was proposed that Paul Allen take control of the franchise. As virtually the sole owner of CCI, Mr. Allen, who had little experience in providing cable services, was to be actively involved in strategic

planning with respect to operations, technology, and expansion of cable operations. (Ct. App. ER at 653.) And, he was proposing to pay the highest acquisition price ever paid for a system, which could potentially impact rates and services. Thus, Allen's take-over was a fundamental change that could impact all subscribers and potential subscribers in the franchise area. Because the ultimate question of whether the transfer should be approved *impacted the community as a whole*, it was clearly a political decision shaped by discretion and public policy, and thus legislative in nature. (*See, Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 523, 169 Cal.Rptr. 904 (1980) [rezoning of just three parcels is a legislative act because it potentially impacted many people and character of community]; *Anaheim Redevelopment Agency v. Dusek*, 193 Cal.App.3d 249, 259-260, 239 Cal.Rptr. 319 (1987) [condemnation of single parcel is a legislative act as it required balancing of owner's interests against a policy adopted to improve the quality of life for agency's "larger constituency"].)

Contrary to Petitioners' claim, the parties' contractual relationship did *not* convert otherwise legislative actions into administrative ones. In *Orange County Cable Communications Co. v. City of San Clemente, supra*, 59 Cal.App.3d 165, the court held that having once granted a franchise, the council *continued to act in its legislative capacity* in denying a rate increase pursuant to the terms of the franchise. (*Id.* at 171.) Although the city had a contractual duty to act in good faith in deciding rate issues, this did not transform the nature of the city's action from legislative to non-legislative. (*Id.* at 172.) Thus, even though the parties' relationship was contractual, the city's actions were reviewable under the arbitrary/capricious standard. (*Id.* at 174; *accord, Santa Margarita Area Residents*

Together v. San Luis Obispo County Bd. of Supervisors, 84 Cal.App.4th 221, 227, 233, 100 Cal.Rptr.2d 740 (2000) [county's regulatory discretion was not limited by development agreement that contemplated future discretionary approvals].)

Further, the provision of the franchise agreement governing transfers was incorporated from the County's Franchise Ordinance, which requires the Board's prior consent. The Ordinance imbues the Board with substantial discretion in granting franchises (decisions are governed by "the public interest") and in granting consent to transfers (consent cannot be "unreasonably withheld"). This legislative discretion cannot be contracted away. (*Southern California Gas Co. v. Los Angeles*, 50 Cal.2d at 713, 718, 329 P.2d 289 (1958).) Indeed, by incorporating the Ordinance's consent provision into the franchise agreement, the parties *expressly retained* the County's broad discretion over transfers. Thus, the Court owed deference to the Board's basic policy decision. (*Lynch v. San Francisco*, 3 Cal.2d 141, 142 (1935).)

The Board, as the legislative branch of County government, "is entitled to the exercise of discretion in judging facts which constitute the basis of its resolutions and ordinances." (*California Assn. of Professional Employees v. County of Los Angeles*, 74 Cal.App.3d 38, 43, 141 Cal.Rptr. 290 (1977).) Consistent with the Ordinance, the Board specifically found that "it would not be *in the public interest* to approve the Transfer at this point in time. . ." and that "it would be *in the public interest* to disapprove the Transfer. . . ." (Ct. App. ER at 350.) In deciding whether the transfer was "in the public interest," the Board's determinations were judgmental as well as factual, implicating issues that bore on its constituents as a whole.

Petitioners suggest a formulaic approach to determining whether an action is legislative: It is legislative only if it sets forth a policy for future cases. This is not helpful because the distinction between legislative and adjudicatory determinations is not so simplistic. (*Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal.App.3d 1202, 1209, 258 Cal.Rptr. 762 (1989); *see*, *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal.App.2d 271, 279, 63 Cal.Rptr. 889 (1967) [presence of elements characteristic of judicial process does *not* make action quasi-judicial; board acted in legislative capacity *in denying requests for consent* to annexation of certain lands even though board acted in response to specific petitions, with regard to specific parties and after hearing evidence]; *Santa Ana Tustin Community Hospital v. Board of Supervisors*, 127 Cal.App.3d 644, 652, 653, 179 Cal.Rptr. 621 (1982) [board's designation of hospitals as "trauma centers," after performing studies, receiving evaluations from experts, and holding meetings, was legislative act reviewable under arbitrary/capricious standard]; *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal.App.4th 1294, 1303, 53 Cal.Rptr.2d 355 (1996) [award of contract is a legislative act].)

Thus, as a rule, where government exercises discretion *guided by considerations of public welfare*, its action is legislative. (*Joint Council of Interns & Residents v. Board of Supervisors*, *supra*, 210 Cal.App.3d at 1211.) That is precisely what the Board did here. (*See*, *Cox Cable San Diego, Inc. v. City of San Diego*, 188 Cal.App.3d 952, 967, 233 Cal.Rptr. 735 (1987) ["[c]able television has been determined to be an industry affected with the public welfare"].)

None of the cases cited by Petitioners support their position. In *Wojcik v. City of Romulus*, 257 F.3d

600 (6th Cir. 2001), the city refused to permit the transfer of an entertainment permit because the proposed location would violate zoning restrictions that required such uses to be at least 500 feet from churches and schools. Plaintiff sued for impairment of contract, a claim that required plaintiff to show a *change* in existing law. The court rejected plaintiff's claim not because the city council's denial was not legislative in nature, but because denying the transfer did not create a *change in law*. (*Id.* at 612-13, 615.)

Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), and *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984), are all inapposite because they concerned *ministerial* land use decisions (*e.g.*, building permits), which have long been held to be administrative in nature.

Kamplain v. Curry County Bd. of Com'rs, 159 F.3d 1248 (10th Cir. 1998) simply held that banning someone from attending the commission's meetings or from speaking at such meetings was administrative in nature. (*Id.* at 1252.) The court's statement as to the nature of contract awards was simply a general expression of opinion that was unnecessary to the court's discussion, and is thus dictum. (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 528, 162 Cal.Rptr. 327 (1980).) As it clearly conflicts with California law and the prevailing view on this subject (*see, e.g., Santa Ana Tustin Community Hospital v. Board of Supervisors*, *supra*, 127 Cal.App.3d at 652 ["award of a contract, and all of the acts leading up to the award, are legislative in character"]), it should be disregarded.

Nor is *Cinevision Corp. v. Burbank*, 745 F.2d 560 (9th Cir. 1984), helpful to Petitioners. There, a city

contracted with a promoter to provide entertainment for the city's amphitheater. The contract gave the city the right to cancel any show. The court held that in excluding specific performers, the city was administering the contract rather than acting legislatively. This was appropriate because the actions reviewed were *ad hoc* decision making: "The City Council voted on *each* proposed group and each vote necessarily affected a *specific* entertainer." (*Id.* at 579, n. 26, emphasis added.)

Here, the Board was not evaluating Petitioners' individual programming or voting on what specific shows would be allowed. Rather, the Board was deciding who would have access to public rights-of-way and control over the sole cable franchise in the south county area. As this decision implicated the rights of all County residents, the County acted legislatively.

V. CONCLUSION.

For all of the foregoing reasons, the County of Santa Cruz respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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